IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 921 OF 2018

Dimension Data Asia Pacific
PTE Ltd. ....Petitioner

V/s.

Deputy Commissioner of
Income-Tax ....Respondent

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Mr. Jehangir Mistri, Senior Counsel a/w. Mr. Atul Jasani, Advocate for the petitioner.

Ms. S.V. Bharucha, Advocate for the respondent.

CORAM :- M.S. SANKLECHA, &

SANDEEP K. SHINDE, JJ.

DATE :- 6TH JULY, 2018.

(ORAL JUDGEMENT : PER :- M.S. SANKLECHA, J)

1. At the request of the Learned Counsel appearing for both sides, the petition is taken up for final hearing and disposal at the stage of admission.

2. This petition under Article 226 of the

Constitution of India challenges the assessment order dated 31st January, 2018 passed by the Assessing Officer under Section 143(3) read with Section 144C(13) read with Section 254 of the Income-Tax Act, 1961 (the Act). The impugned order dated 31st January, 2018 disposes of the assessment for Assessment Year 2011-12.

3. At the outset, the Revenue contended that, this petition should not be entertained as an alternate remedy of an Appeal under the Act from the impugned order is available. It is the petitioner's case that the impugned order is without jurisdiction as it has been filed in the face of the mandatory provisions of Section 144C of the Act. We would therefore examine the contention of the petitioner and if the same is found to be correct, then the plea of invoking the self impose rule of not entertaining the petition as an alternate relief is available will not apply. It is a settled position in law that where the order challenged is without jurisdiction, then a writ could be entertained, as held by the Supreme Court in **Whirlpool**

Corporation vs. Registration of Trade Marks, 1998 (8) SCC 1.

4. Briefly, the facts relevant to this petition are as under :

(a) The petitioner is Foreign Company and entitled to the procedure provided under Section 144C of the Act as it is an eligible Assessee as defined therein.

(b) On 30th November, 2011 the petitioner filed its return of income for the Assessment Year 2011-12. In its return, it declared Nil income.

(c) Thereafter, on 20th March, 2015 a draft assessment order as required under Section 144C(1) of the Act was passed for Assessment Year 2011-12. The petitioner filed its objections in terms of Section 144C(2)(b) of the Act to the

Dispute Resolution Panel (DRP).

(d) On 4th December, 2015 the DRP issued directions on the petitioner's objection to the draft assessment order dated 20th March, 2015.

(e) Consequent to the directions of the DRP, an order of assessment dated 11th January, 2016 was passed under Section 143(3) read with Section 144(C)(13) of the Act.

5. The petitioner's challenge to the impugned order dated 31st January, 2018 is that, it is without jurisdiction as it is passed in defiance of Section 144C of the Act. The petitioner is a Foreign Company. Therefore, in terms of Section 144C of the Act, a separate procedure for passing Assessment orders and appellate procedure thereupon is provided for eligible assessee as defined in Section 144C(15) of the Act, which includes Foreign Company. Therefore, in terms thereof, the petitioner is

entitled to a draft assessment order being passed under Section 144(1) of the Act before the final assessment order as passed in this case under Section 143(3) read with Section 144(13) of the Act being the impugned order. Thus, the impugned order dated 31st January, 2018 ignores the mandate of Section 144C of the Act. Resultantly, it takes away the petitioner's right to object to the Draft Assessment Order before the DRP. Therefore, taking away a valuable right of the petitioner before the Assessing Officer passes a final order which can be subjected to appellate proceedings. In support, reliance was placed upon the decisions of this Court in **International Air Transport Association Vs. Deputy Commissioner of Income-Tax, 241 Taxman 249**, and of Delhi High Court in **JCB India Ltd. v. Deputy Commissioner of Income-tax, [2017] 85 taxmann.com 155 (Delhi).**

6. As against the above, it is the respondent's contention that the order dated 5th May, 2017 of the

Tribunal does not set aside the original assessment order dated 11th January, 2016 and merely restores it to the Assessing Officer to give effect to its order dated 5th May, 2017. This restoration to the Assessing Officer is only to determine the profits attributable to the P.E in India. In above circumstances, it is contended by the Revenue that the requirement of passing a draft assessment order in terms of Section 144C of the Act is not called for, as the order dated 31st January, 2018 is only an order giving effect to the order dated 5th May, 2017 of the Tribunal. The remedy, if any, of the petitioners according to the Revenue is filing an Appeal from the impugned order dated 31st January, 2018 to the Income Tax Appellate Tribunal and/or the Commissioner of Income-Tax (Appeals).

7. We note that, it is an undisputed position before us, that the petitioner is a Foreign Company and an eligible assessee as defined in Section 144C(15)(b)(ii) of the Act. It has been held by this Court in *International*

Air Transport Association (supra) that a Foreign Company is entitled to being assessed in accordance with Section 144C of the Act. It is the above Section 144C of the Act, which provides a separate scheme for the manner in which the Assessing Officer would pass assessment orders under the Act and a separate procedure to challenge an draft order i.e. before an assessment order which is subject to appeal under the Act is passed. The entire object is to ensure that the disputes of Foreign Companies are resolved expeditiously and final assessment orders are not passed without a re-look to the proposed order (draft order), if so desired by the Foreign Company. In essence, it obliges the Assessing Officer to first pass a draft of the proposed assessment order indicating the proposed variation in the income returned. This draft Assessment Order is to be passed under Section 144C(1) of the Act, which entitles an eligible assessee such as a Foreign Company to approach the DRP with its objection to the Draft Assessment order. This is so provided, so that an eligible assessee can have his grievance addressed before the final assessment order is passed. In case, an assessee does not object to the draft assessment order, then a final assessment order is passed in terms of the draft assessment order by the Assessing Officer. It is only on passing of the final assessment order that the assessee, if aggrieved by it, would be able to approach the appellate authorities under the Act. These special rights are made available under Section 144C of the Act to an eligible assessee such as the petitioner. Therefore, it cannot be ignored by passing an final order under Section 144(13) of the Act without preceding it with a Draft Assessment order as required therein.

8. The contention of the Revenue that the requirement of passing a draft Assessment Order under Section 144C of the Act would only extend to the orders passed in the first round of proceedings or in respect of an order passed by the Assessing Officer in remand proceedings by the Tribunal which has entirely set aside the original assessment order. This distinction which is

sought to be drawn by the Revenue is not borne out by Section 144C of the Act. Infact, the Delhi High Court in *JCB (India) Ltd.* (supra) held that, even in partial remand proceedings from the Tribunal, the Assessing Officer is obliged to pass a draft assessment order under Section 144C(1) of the Act. According to us, the Assessing Officer, is obliged to, in terms of Section 144C of the Act to pass a Draft Assessment Order in all cases where he proposes to assess the Foreign Company under the Act by making a variation in the returned income. In this case, the impugned order dated 31st January, 2018 has been passed in terms of Section 143(3) read with Section 144C read with Section 254 of the Act and it certainly makes a variation to the returned income filed by the petitioner. This even if, one proceeds on the basis that the returned income stands varied by the order of the Tribunal in the first round, to the extent the petitioner accepts it. Therefore, the Assessing Officer correctly invokes Section 144C of the Act in the impugned order. Once having invoked Section 144C of the Act, the Assessing Officer is obliged to comply with it in full and not partly. This impugned order was passed consequent to the order of the Tribunal dated 5th May, 2017 restoring some of the issues before it to the Assessing Officer for fresh adjudication.

9. This "fresh adjudication" itself would imply that it would be an order which would decide the lis between the parties, may not be entire lis, but the dispute which has been restored to the Assessing Officer. According to us, the order dated 31st January, 2018 is not an order merely giving an effect to the order of the Tribunal, but it is an assessment order which has invoked Section 143(3) of the Act and also Section 144C of the Act. This invocation of Section 144C of the Act has taken place as the Assessing Officer is of the view that it applies, then the requirement of Section 144C(1) of the Act has to be complied with before he can pass the impugned order invoking Section 144C(13) of the Act. Infact, Section 144C(13) of the Act can only be invoked in cases where the assessee has approached the DRP in terms of sub-

Section 144(C)(2)(b) of the Act and the DRP gives direction in terms of Section 144C(5) of the Act. In this case, the assessment order has invoked Section 144C(13) of the Act without having passed the necessary draft Assessment Order under Section 144C(1) of the Act, which alone would make an direction under Section 144C(5) of the Act by the DRP possible. Thus, the impugned order is completely without jurisdiction.

10. Moreover, so far as a Foreign Company is concerned, the Parliament has provided a special procedure for its assessment and appeal in cases where the Assessing Officer does not accept the returned income. In this case, in the working out of the order dated 5th May, 2017 of the Tribunal results in the returned income being varied, then the procedure of passing a draft assessment order under Section 144C(1) of the Act is mandatory and has to be complied with, which has not been done.

11. In the above view, the impugned order is

without jurisdiction. Thus, the plea of alternate remedy advanced by the Revenue so as to not entertain this petition, does not merit acceptance in the present facts.

12. In the above view, the impugned order dated 31st January, 2018 has been passed without complying with the mandatory requirements of Section 144C of the Act which is applicable to a Foreign Company such as the petitioner. Therefore, the impugned order is quashed and set aside. Needless to state, this order would not, in any way, stop the Revenue from taking such steps as are available to it in law and the petitioner also from contesting the action of the Revenue in accordance with law, if it so desires.

13. Petition allowed in above terms. No order as to costs.

(SANDEEP K. SHINDE, J) **(M.S. SANKLECHA, J)**